



**In the Supreme Court
of the United States**
October Term, 1976

No. 76-985

GEVYN CONSTRUCTION CORP.
Petitioner

v.

LIMBACH COMPANY
Respondent

**LIMBACH COMPANY'S OPPOSITION TO
GEVYN CONSTRUCTION CORP.'S
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT**

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February 11, 1977

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The respondent LIMBACH COMPANY respectfully requests that Gevyn Construction Corp.'s Petition for a Writ of Certiorari to review the judgment and the opinion of the United States Court of Appeals for the First Circuit rendered in these proceedings on October 20, 1976, be denied.

QUESTIONS PRESENTED

In 1970, a dispute between a subcontractor and its general contractor was submitted to the American Arbi-

tration Association, pursuant to the general contractor's demand for arbitration (App. A). In 1971, the subcontractor brought suit in the Superior Court for the Commonwealth of Massachusetts against the general contractor and its surety under a statute, Mass. Gen. Laws c. 149 §29, which required that such a suit be brought within one year after the filing of a sworn claim with the owner (Pet. p. 36). The general contractor removed that suit to the United States District Court for the District of Massachusetts. Proceedings in the suit were thereupon stayed, pursuant to a stipulation between the subcontractor and the general contractor and its surety (App. B). In April 1976, the District Court, in the absence of an agreement between the parties, directed that a final award be rendered within 60 days in the arbitration between the general contractor and the subcontractor. The general contractor appealed to the United States Court of Appeals for the First Circuit from that Order of the District Court. On October 20, 1976, the Court of Appeals dismissed the general contractor's appeal. The question presented here has been answered in the negative by the United States Court of Appeals for the First Circuit.

1. Where a suit brought by a subcontractor under Mass. Gen. Laws, c. 149 §29 was stayed pending arbitration in 1971 by stipulation of the parties, is the Order of the United States District Court for the District of Massachusetts entered on April 2, 1976, requiring that an award be entered in 60 days, appealable without a certificate under 28 U.S.C. §1292(b)?

STATEMENT

This suit was brought by Respondent LIMBACH COMPANY ("Limbach"), in equity, in Suffolk Superior Court, Boston, Massachusetts, against Petitioner GEVYN CONSTRUCTION CORP. ("Gevyn") and its bonding company,

THE TRAVELERS INDEMNITY COMPANY ("Travelers"), pursuant to Mass. Gen. Laws, c. 149 §29, in January 1971. Limbach seeks payment for labor and materials furnished by it in the construction of the Middlesex County Superior Courthouse pursuant to a contract between Limbach and Gevyn dated November 7, 1967. Gevyn subsequently removed the suit to the United States District Court for the District of Massachusetts on the grounds of diversity of citizenship. On June 7, 1971, the parties stipulated that all further proceedings in this suit be stayed pending the completion of arbitration of the claim of Limbach (App. B). The claim had been submitted to arbitration in 1970 pursuant to Gevyn's demand for arbitration before the American Arbitration Association (App. A) and bears docket No. 1110-0069(13)-70 (App. B). A single conglomerate arbitration hearing has been underway in which the claims of Limbach and the other subcontractors against Gevyn have been heard, as well as Gevyn's claim against the Middlesex County Commissioners ("County") the "owners" of the Middlesex County Courthouse.

On April 2, 1976 the District Court, in the absence of any agreement between the parties, and in light of the long pendency of the action, issued an order that an award be rendered on Limbach's claim in the arbitration within 60 days (App. C). On April 12, 1976, Gevyn filed a Motion for Reconsideration of or Amendment of Order dated April 2, 1976 to Include the Statement Prescribed by 28 U.S.C. §1292(b) (Pet. p. 8). On May 10, 1976, the District Court denied Gevyn's Motion for Reconsideration or Amendment (Pet. p. 8). On May 17, 1976, Gevyn filed a Notice of Appeal from the District Court's Order of April 2, 1976 and from the District Court's Order of May 10, 1976 denying its Motion for Reconsideration (Pet. p. 8). On May 20, 1976, Gevyn filed an Application for Approval of Supersedeas Bond or Stay of Order

Pending Appeal with the District Court (Pet. p. 8). On May 24, 1976, the District Court denied Gevyn's Application (Pet. p. 8). On May 28, 1976, Gevyn filed an Application for Approval of Supersedeas Bond or Stay of Order Pending Appeal with the United States Court of Appeals for the First Circuit. On June 2, 1976, the Court of Appeals declined to stay the Order of the District Court pending appeal (App. D).

On September 9, 1976, the Court of Appeals heard argument on Gevyn's appeal. On October 20, 1976, the Court of Appeals dismissed Gevyn's appeal (Pet. p. 16). On January 18, 1977, Gevyn filed its Petition for Writ of Certiorari, now before this Court.

REASONS FOR DENYING THE WRIT

The United States Court of Appeals for the First Circuit, after submission of briefs and oral argument, concluded that it was without jurisdiction to entertain Gevyn's appeal. In so holding, the Court of Appeals has not decided an important question of Federal law which has not been directly settled by this Court nor did it decide a Federal question in any way contravening the Federal Arbitration Act and the concept of independent arbitration proceedings.

The decision of the Court of Appeals is consistent with the long standing Federal policy against piecemeal appeals from interlocutory orders.

I. THE JURISDICTIONAL BASES FOR APPEALS ARE CLEARLY DEFINED BY STATUTE AND THE DISTRICT COURT'S ORDER DOES NOT COME WITHIN THE STATUTE OR THE NARROWLY DEFINED EXCEPTIONS THERETO.

The Court of Appeals properly found that the District Court's Order required the prompt conclusion of

the arbitration between Limbach and Gevyn, and nothing further (Pet. p. 19). The rendering of an award to Limbach in the arbitration does not result in a termination of the litigation because either Limbach or Gevyn must then move the District Court for confirmation or vacation of that award. Prior to such action by the District Court, the award of the arbitrators is unenforceable against the parties. Therefore, the Order of the District Court is not a final decision within the traditional meaning of that term, (see, *Baetjer v. Garzot Fernandez*, 329 F.2d 798 (1st Cir. 1964)) and is therefore not appealable pursuant to 28 U.S.C. §1291.

Gevyn argues to this Court, and has argued to the Court of Appeals, that the District Court's Order is appealable as a "final order" because it effectively disposes of an important claim of right separate from and collateral to rights asserted in the main cause of action which may be lost if appellate consideration is delayed for a decision of the whole case (Pet. p. 12). See, *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 546 (1949) and *Swift & Co. Packers v. Compania Columbian del Caribe*, 339 U.S. 684, 688-689 (1950). Gevyn here, and in the Court of Appeals, voiced its concern that it will be exposed to the risk of inconsistent arbitration awards unless the District Court's Order is reviewed on appeal (Pet. p. 11).

The Court of Appeals specifically stated that, even assuming that Gevyn's fears were well founded, it still did not believe that the assertedly prejudicial impact of the District Judge's Order would escape their review if enforcement by the Court of an unfavorable arbitral award is ultimately appealed (Pet. p. 20). The Court of Appeals rightly found that Gevyn's ability to assert the alleged error of the April 2 Order would not be vitiated by requiring Gevyn to wait appeal of a final decision (Pet. p. 20).

Notwithstanding the fact that Gevyn might be put to the added expense and inconvenience of seeing to its end an arbitral proceeding which Gevyn asserts is "fatally infected by error", this does not bring the case within the *Cohen* exception to §1291. The Court of Appeals stated:

"Rather this is the price which litigants must pay if the Federal judicial system is to be protected from piecemeal appeals from erroneous interlocutory orders, even those which ultimately result in reversible error." *New England Power Co. v. Asiatic Petroleum Corp.*, 456 F.2d 183 (1st Cir. 1972). (Pet. p. 21)

The Court of Appeals went further, stating that the ultimate effect of that trial judge's order is speculative, suggesting that hindsight is the better tool for examining its allegedly prejudicial impact (Pet. p. 21). The reasoning of the First Circuit in *New England Power*, *supra*, indicates that an order affecting the manner of arbitration is not appealable.

Thus, the Court of Appeals was correct in its finding that the District Court's Order of April 2, 1976 was not appealable, either as a "final order" under 28 U.S.C. §1291 or as an exception to §1291 under the so-called *Cohen* doctrine.

II. THE DISTRICT COURT'S ORDER OF APRIL 2, 1976 IS NOT REVIEWABLE AS A MODIFICATION OF AN EARLIER INJUNCTION.

The Court of Appeals, in its opinion, adopted Gevyn's characterization of the stay of the proceedings in 1971 as an injunction, notwithstanding the fact that such stay was by way of stipulation entered by the parties rather than by order of the District Court. Notwithstanding, the Court of Appeals stated that the inter-

relationship between [the 1971 stay and the District Court's Order of April 2, 1976] is too attenuated for the 1976 order to be termed a "modification" of the 1971 stay (Pet. p. 22).

Thus, the Court of Appeals rightly found that the District Court's Order of April 2, 1976 was not appealable as a modification of an earlier injunction pursuant to 28 U.S.C. §1292(a)(1).

III. THE ORDER OF THE DISTRICT COURT IS NOT AN INTERLOCUTORY INJUNCTION WHICH IS APPEALABLE.

Gevyn argued to the Court of Appeals, and now in its Petition for Certiorari, that the Order of the District Court of April 2, 1976 is injunctive in light of its terms and its intended coercive effect upon the arbitrators (Pet. p. 13).

This Court has narrowly defined the class of interlocutory injunctions which are subject to appeal. This Court has read into §1292(a)(1) a requirement that the injunction dispose of a substantive issue:

"Orders that in no way touch on the merits of the claim but only relate to pre-trial procedures are not in our view interlocutory within the meaning of §1292(a)(1)." *Switzerland Cheese Association v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966). (Pet. p. 23).

The Order in this case does not touch the merits of any claim of right. Rather, it relates only to "pre-trial procedures" and is, therefore, not an interlocutory order granting an injunction within the meaning of §1292(a)(1).

Gevyn's reliance upon language in this Court's opinion in *Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289 (1975) is unfounded. In *Aberdeen*, the order was injunctive because it compelled the ICC, a party to the litigation, to perform an act which it would not otherwise be required to do. It constituted a classic example of a court governing the actions of parties before it in a proceeding in another forum. The Order of the District Court of April 2, 1976, however, is directed to a proceeding which exists because of the contractual obligations of the parties before it. The stay of the legal proceedings before the Court does not deprive the Court of its jurisdiction. The arbitration is not a completely distinct forum, since any award issuing therefrom is not self-executing and must be confirmed or vacated by the District Court before it is enforceable. The Order of the District Court of April 2, 1976 merely directs the timing of an act which the arbitrators are bound to perform in any event.

The Order of the District Court is thus not injunctive in nature, as argued by Gevyn, but rather constitutes a proper exercise by the District Court of its discretion in insuring the interests of judicial economy and justice to the litigants before it. The Order does not touch the merits of any claim of right but merely relates to pre-trial procedures which are not "interlocutory" within the meaning of §1292(a) (1).

CONCLUSION

For the reasons stated above, this Court should deny Gevyn's Petition for Certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit. Limbach respectfully requests that such Petition be denied and that Limbach be awarded its costs.

Respectfully submitted,

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 100 Federal Street
 Boston, Massachusetts 02110
 (617) 357-9300
 Counsel for Limbach

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APPENDIX A

**AMERICAN ARBITRATION ASSOCIATION,
Administrator
Construction Industry Arbitration Rules
DEMAND FOR ARBITRATION**

DATE: July 9, 1970

To:

Middlesex County Commissioners
128 Third Street
Cambridge, Massachusetts 02141

Acoustical Materials Corp.***
111 Prestige Park Road
East Hartford, Conn. 06108

Named claimants are parties to an Arbitration Agreement contained in written contracts dated October 27, 1967 to March 5, 1970 which agreements provide for arbitration under the Construction Industry Arbitration Rules, hereby demand arbitration thereunder.

NATURE OF DISPUTE: Payment due for work performed and claim for loss, cost, damage and expense as the result of defective drawings, delays to and suspension and termination of work on the Middlesex County Superior Court House, Project 632-C.

CLAIM OR RELIEF SOUGHT: Damages incurred by claimant and all Respondents except the County of Middlesex in amounts presently indeterminate, with separate findings as to the rights of each of said parties and damages, plus interest, costs and expenses to which each is entitled.

HEARINGS LOCALE REQUESTED: Boston, Massachusetts.

You are hereby notified that copies of our Arbitration Agreement and of this Demand are being filed with the American Arbitration Association at its Boston Regional Office, with the request that it commence the administration of the arbitration. Under Section 7 of the Arbitration Rules, you may file an answering statement within seven days after notice from the Administrator.

Signed Robert J. Stern, attorney

Name of Claimant Gevyn Construction Corporation

Address 715 Mamaroneck Avenue

City and State Mamaroneck, New York 10543

Telephone 914-698-8200

Two copies of this Demand and the Arbitration Agreement must be filed, and the filing fee paid, as provided in Section 47 of the Rules, in order to institute proceedings.

cc: Edward J. Tedesco Associates
48 Mount Vernon Street
Winchester, Massachusetts 01890

Counsel for Gevyn Construction
Leslie A. Hynes, Esq.
25 Broadway
New York, New York 10004
Tel.: 212-422-9424

Acoustical Materials Corp.
111 Prestige Park Road
East Hartford, Connecticut 06108

John D. Ahern Co., Inc.
Thorndike & Robin Streets
Everett, Massachusetts 02149

American Laundry Machinery Industries
5050 Section Avenue
Cincinnati, Ohio 45212

Anastasi Brothers Corp.
853 Plain Street
Marshfield, Massachusetts 02050

The William Bayley Company
1200 Warder Street
Springfield, Ohio 45501

A. Belanger & Sons, Inc.
173 Harvey Street
Cambridge, Massachusetts 02140

Peter Bratti Associates, Inc.
103 Park Avenue
New York, New York 10017

Colonial Marble Company, Inc.
25 Garvey Street
Everett, Massachusetts 02149

Fischbach & Moore, Inc.
60 Rogers Street
Cambridge, Massachusetts 02142

Gaffny Plumbing & Heating Corp.
North Main Street
Middleton, Massachusetts 01949

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Haughton Elevator Co.
182 Washington Street
Somerville, Massachusetts 02143

Limbach Company
150 Causeway Street
Boston, Massachusetts 02114

Mari & Sons Flooring Co., Inc.
38 Kent Street
Somerville, Massachusetts 02143

Murphy Door Bed Co., Inc.
40 East 34th Street
New York, New York 10016

Peters & Company, Inc.
74 Lawley Street
Dorchester, Massachusetts 02122

Pittsburgh Plate Glass Co.
300 Babcock Street
Boston, Massachusetts 02215

E. T. Ryan Iron Works, Inc.
1027 Turnpike Street
Canton, Massachusetts 02021

Nelson J. Sanford & Sons, Inc.
335 Main Street
Stoneham, Massachusetts 02180

Virginia Metal Products, Inc.
Division of the Gray Mfg. Co.
789 Massachusetts Avenue
Lexington, Massachusetts 02173

Western Waterproofing Co., Inc.
325 Old Colony Avenue
South Boston, Massachusetts 02127

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APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LIMBACH COMPANY
v.
GEVYN CONSTRUCTION CORPORATION
AND
THE TRAVELERS INDEMNITY COMPANY

CIVIL ACTION
No. 71-342-C

STIPULATION

It is stipulated by the parties that further proceedings in the above-entitled action should be stayed pending the entry of a final award in the arbitration between plaintiff and defendant Gevyn Construction Corporation, which arbitration is now pending before the American Arbitration Association, 294 Washington Street, Boston, bearing Docket Number 1110-0069(13)-70.

/s/ FRANCIS H. FOX

.....
Attorney for Plaintiff

/s/ JOSEPH T. FAHY

.....
*Attorney for Gevyn Construction
Corporation and The
Travelers Indemnity Company*

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APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LIMBACH COMPANY,
Plaintiff

v.

GEVYN CONSTRUCTION CORPORATION
AND
THE TRAVELERS INDEMNITY COMPANY,
Defendants

CIVIL ACTION

No. 71-342-C

ORDER

Upon application of Limbach Company, pursuant to Massachusetts General Laws c. 251, §8b, it is hereby ordered that an award be made in the matter of Limbach Company v. Gevyn Construction Corporation, American Arbitration Association No. 1110-0060(13)-70 within 60 days from the date of this order.

/s/ ANDREW A. CAFFREY

.....
USDJ

Date: April 2, 1976

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APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 76-1247.

LIMBACH COMPANY
Plaintiff, Appellee,

v.

GEVYN CONSTRUCTION CORPORATION
Defendant, Appellant.

ORDER OF COURT

Entered June 2, 1976

Upon "Motion of Appellant, Gevyn Construction Corp. for Approval of Supersedeas Bond or, in the Alternative, for Stay of Order Pending Gevyn Construction Corp.'s Appeal Pursuant to F.R.A.P. 8(a), Affidavit in Support Thereof, and Request for Oral Argument" and opposition thereto.

It is ordered that said motion be, and the same hereby is, denied.

By the Court:

/s/ DANA H. GALLUP
Clerk

(Cert. c. Clerk, U.S.D.C., Mass.; cc: Messrs.
Hynes, Monihan and O'Brien.)